(24,660)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 105.

GEORGE W. STEWART, PLAINTIFF IN ERROR,

vs.

CHARLES H. RAMSAY.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 28, 1916.

1 Pleas in the District Court of the United States, for the Northern District of Illinois, Eastern Division, begun and held at the United States Court room, in the City of Chicago, in said District and Division, before the Honorable George A. Carpenter, District Judge of the United States for said Northern District of Illinois, on Thursday, the twenty-fifth day of March, being one of the days of the March Term of said Court, begun Monday, the first day thereof, in the year of our Lord one thousand nine hundred and fifteen, and of the Independence of the United States of America, the one hundred and thirty-ninth year.

Present: Honorable George A. Carpenter, Judge of said Court, Presiding: John J. Bradley, United States Marshal for said District and T. C. MacMillan, Clerk of said Court.

1½ In the District Court of the United States for the Northern District of Illinois, Eastern Division.

31626.

GEORGE W. STEWART, Plaintiff,
vs.
CHARLES H. RAMSAY, Defendant.

Be it remembered, That heretofore to-wit: on the twenty-eighth day of March, 1914, came the plaintiff in the above entitled cause, by his attorney, and filed in the Clerk's office of said Court a certain Præcipe, praying the issuance of Summons. Said Præcipe is in the words and figures following to-wit:

2 *Præcipe.*

UNITED STATES OF AMERICA,
Northern District of Illinois, Eastern Division, ss:

District Court, March Term, A. D. 1914.

GEORGE W. STEWART
vs.
CHARLES H. RAMSAY.

In Assumpsit.

Damages, $8,000.00.

The Clerk of said Court will issue a summons in said cause to said defendants, in a plea of trespass on the case upon promises to the damage of said plaintiff in the sum of Eight Thousand (8,000)

Dollars, direct the same to the United States Marshal for said District to execute, and make it returnable to the May Term of said Court, 1914.

Dated this twenty-eighth day of March A. D. 1914.

ROBERT C. FERGUS,
Plaintiff's Attorney.

To T. C. MacMillan, Clerk.

(Endorsed:) Filed Mar. 28, 1914. T. C. MacMillan, Clerk.

3 And on the same day to-wit: the twenty eighth day of March, 1914, a certain Summons issued out of the Clerk's office of said Court, directed to the Marshal of said District to execute. Said Summons, together with the return of the Marshal thereon endorsed is in the words and figures following to-wit:

4 DISTRICT COURT OF THE UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

United States of America to the Marshal of the Northern District of Illinois, Greeting:

We command you to summon Charles H. Ramsay, if found in your District, to be and appear before our Judge of the District Court of the United States for the Northern District of Illinois, on the first day of the next Term thereof, to be holden at Chicago, in the District aforesaid, on the first Monday of May next, to answer unto George W. Stewart, of a plea of trespass on the case upon promises, to his damages, as he alleges, of Eight Thousand (8,000) Dollars, and have you then and there this Writ.

Witness, The Hon. George A. Carpenter Judge of the District Court of the United States of America, at Chicago aforesaid, this twenty-eighth day of March, in the year of our Lord one thousand nine hundred and fourteen (1914) and of our Independence the 138th year.

[SEAL.]

T. C. MACMILLAN, *Clerk,*
By ARTHUR E. CLAUSSEN,
Deputy Clerk.

5 I have served this writ within my district, in the following manner, to-wit:

By delivering a true copy of the same to the within named Charles H. Ramsay, at Chicago, on the 28th day of March, A. D. 1914.

LUMAN T. HOY,
U. S. Marshal,
By H. B. COY, *Deputy.*

Marshal's Fees: 1 Service $2.00.
Writ served in Fed'r'l Bldg.

(Endorsed:) Filed April 3, 1914. T. C. MacMillan, Clerk.

6 And afterwards to-wit: on the eighteenth day of May, 1914, came the plaintiff in said entitled cause by his attorney and filed in the Clerk's office of said Court, his certain Declaration in words and figures following to-wit:

7 *Declaration.*

UNITED STATES OF AMERICA,
Northern District of Illinois,
Eastern Division, ss:

In the District Court thereof, May Term, A. D. 1914.

At Law. No. 31626.

GEORGE W. STEWART, Plaintiff,
vs.
CHARLES H. RAMSAY, Defendant.

Assumpsit.

George W. Stewart of the City of Chicago, in the County of Cook and State of Illinois, who is a citizen of the said State of Illinois and of the United States, and a resident of the said Eastern Division of the Northern District of Illinois, plaintiff in this suit by Robert C. Fergus, his Attorney, complains of Charles H. Ramsay of Greeley, in the County of Weld and State of Colorado, who is a citizen and resident of said State of Colorado, defendant in this suit, summoned, etc., upon a plea of trespass, on the case on promises:

For that, whereas, the said defendant, to-wit, on the twenty-fifth day of July, A. D. 1911, at Greeley, Colorado, to-wit, at Greeley, Colorado, in the County of Weld, to-wit, in the Division and District aforesaid, made his certain promissory note in writing, bearing date on the day and year aforesaid, and then and there delivered the same to A. M. McClenahan, in and by which said note, said defendant, by the name, style and description of Charles H. Ramsay promised to pay to the order of the said A. M. McClenahan, one thousand (1,000) dollars, on July 1, A. D. 1914, at Greeley, Colorado, with interest thereon at the rate of seven (7) per cent. per annum, payable semi-annually, and ten (10) per cent. per annum after maturity, for value received. And the said
8 A. M. McClenahan, to whom or to whose order the said note was payable, afterwards, to-wit, on the same day and year and at the place aforesaid, endorsed the said note in writing, by which said endorsement the said A. M. McClenahan, then and there ordered and appointed the said sum of money in the said note mentioned to be paid to the said plaintiff, and then and there delivered the said note, so endorsed, to the said plaintiff. By means whereof, and by force of the statute in such case made and pro-

vided, the said defendant became liable to pay to the said plaintiff the said sum of money in the said note specified, according to the tenor and effect of the said note and of the said endorsement, so thereon made as aforesaid; and, being so liable, the said defendant, in consideration thereof, afterwards, to-wit, on the same day and year, and at the place last aforesaid, undertook, and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff, the said sum of money in the said note specified, according to the tenor and effect of the said note and of the said endorsement so thereon made as aforesaid.

And, Whereas, also on or about the tenth day of August, A. D. 1911, the said defendant employed the said plaintiff at the City of Denver, in the County of Arapahoe and State of Colorado, to procure a purchaser for certain property, to-wit, four hundred eighty (480) acres of land at Ft. Morgan, in the County of Morgan and State of Colorado, also for a certain lot or lots of land with the improvements thereon, situate at Salida, in the County of Chaffee and State of Colorado, also for his certain promissory notes to the aggregate amount of principal in the sum of ten thousand (10,000) dollars, and also certain irrigation bonds to the aggregate amount of principal in the sum of ten thousand four hundred (10,400) dollars, the property of the said defendant, and agreed and promised to pay said plaintiff, if he could and would procure a purchaser therefor at a price and upon terms satisfactory to him, the said defendant, the usual and customary commission for procuring such purchaser, and the plaintiff avers that the usual and customary commission in such case is five (5) per cent. upon the purchase price paid, and plaintiff avers that thereupon afterwards, to-wit, on the tenth day of August, A. D. 1911, to-wit, at the Division
9 and District aforesaid, the plaintiff, at the instance and request of the defendant as aforesaid did procure a purchaser for said divers properties at a price and upon terms satisfactory to said defendant for the sum of, to-wit, one hundred twenty thousand (120,000) dollars, and the same was accepted by defendant and such sale closed with such purchaser, whereby and by reason whereof the defendant then and there became and is indebted to the said plaintiff in the sum of, to-wit, six thousand (6,000) dollars and interest thereon from, to-wit, August 10, A. D. 1911.

And Whereas, also, the said defendant did on or about the tenth day of August, A. D. 1911, employ the plaintiff to sell divers other properties of the defendant upon terms and prices to be satisfactory to him, and promised the plaintiff if he should find a purchaser therefor he would pay the plaintiff five (5) per cent. on the amount of the purchase price to be paid therefor, and thereupon the plaintiff did procure a purchaser for said properties at prices and terms satisfactory to the said defendant, the purchase price paid therefor to the said defendant being the sum of, to-wit, one hundred twenty thousand (120,000) dollars, to-wit, at the time and place, and in the Division and District last aforesaid, whereby and by reason whereof the said defendant became and is indebted to plaintiff in the sum of, to-wit, six thousand (6,000) dollars.

And Whereas, also, the said defendant afterwards, to-wit, on the tenth day of August, A. D. 1911, to-wit, in the Division and District aforesaid, became and was indebted to the said plaintiff in the further sum of six thousand (6,000) dollars, of lawful money of the United States of America, for money before that time lent and advanced by the said plaintiff to the said defendant, and at the special instance and request of the said defendant. And in the like sum for other money by the said plaintiff before that time paid, laid out and expended for the said defendant, and at the like special instance and request of the said defendant. And in the like sum for other money by the said defendant before that time had and received to and for the use of the said plaintiff. And in the like sum for other money before that time and then due and owing the said plaintiff for interest upon and for the forbearance of divers other sums of money before that time and then due and owing from said defendant to said plaintiff. And in the like sum for goods, wares and merchandise before that time sold and delivered by the said plaintiff to the said defendant at the like special instance and request of the said defendant. And in the like sum for the price and value of work then done and material for the same provided by the said plaintiff for the said defendant, and at the like special request of the defendant. And being so indebted, the said defendant in consideration thereof, afterwards, to-wit: on the day and year last aforesaid, and at the place last aforesaid, undertook, and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the several sums of money in this count mentioned, when the said defendant should be thereunto afterwards requested.

And Whereas, also, the said defendant, afterwards, to-wit, on the day and year last aforesaid, and at the place last aforesaid, accounted together with the said plaintiff of and concerning divers other sums of money, before that time due and owing from the said defendant to the said plaintiff and then and there being in arrear- and unpaid, and upon such accounting the said defendant then and there was found to be in arrear- and indebted to the said plaintiff in the further sum of six thousand (6,000) dollars of like lawful money as aforesaid. And being so found in arrear- and indebted to the said plaintiff the said defendant in consideration thereof, afterwards, to-wit, on the day and year last aforesaid, and at the place last aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the sum of money last mentioned, when the said defendant should be thereunto afterwards requested.

Nevertheless, the said defendant (although often requested, etc., to-wit, on the day when the said note became due and payable, according to the tenor and effect thereof, and oftentimes since, to-wit, at the place last aforesaid), has not yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiff, but to pay the same or any part thereof, to the said plaintiff the said defendant has hitherto wholly neglected and refused, and still does neglect and refuse, to the dam-

age of the said plaintiff of eight thousand (8,000) dollars, and therefore the said plaintiff brings suit, etc.

ROBERT C. FERGUS,
Plaintiff's Attorney.

11 *Copy of Instrument.*

UNITED STATES OF AMERICA.

No. 1. $1,000.00.

Colorado.

Real Estate Coupon Bond Secured by First Mortgage.

GREELEY, COLORADO, July 25, 1911.

On July first, 1914, after date, for value received, I promise to pay to the order of A. M. McClenahan, One Thousand Dollars at the Greeley National Bank, Greeley, Colorado, with interest at the rate of seven per cent. per annum payable semi-annually as per six coupons hereto attached. It is agreed that if this note is not paid at maturity it shall then draw interest at the rate of ten (10) per cent. per annum, and that on failure to pay any installment of interest when due the holder hereof may collect the principal and interest at once.

This note may be paid on July 1st, 1912, or on any interest pay day thereafter by payor giving thirty (30) days' notice thereof.

CHARLES H. RAMSAY.

Endorsed as follows:

For value received — hereby transfer and assign the within note together with all — interest in and rights under the Mortgage securing the same to —— —— without recourse. Dated this — day of ——, 19—.

A. M. McCLENAHAN.

Copy of Account.

DENVER, COLORADO, August 10, 1911.

Mr. Charles H. Ramsay, in Account with George W. Stewart.

To commission for the sale of the following properties of said Charles H. Ramsay:

Four hundred eighty (480) acres situate at Ft Morgan, Morgan County, Colorado, Lot or Lots with improvements thereon situate at Salida, Chaffee County, Colorado, $10,000.00 of personal notes of said Charles H. Ramsay, and $10,400.00 of irrigation bonds, Sold at the sum of.....	$120,000.00
Commission thereon at 5%.....	6,000.00

12 *Copy of Account.*

CHICAGO, ILLINOIS, May 18, 1914.

Mr. Charles H. Ramsay in Acount with George W. Stewart.

To goods, wares and merchandise, sold and delivered....	$8,000.00
To money lent and advanced.....	8,000.00
To money paid, laid out and expended.....	8,000.00
To money had and received to and for the use of plaintiff	8,000.00
To money due for interest and forbearance.....	8,000.00
To labor, services and material.....	8,000.00
To balance due on account stated.....	8,000.00

Plaintiff's Affidavit of Amount due.

UNITED STATES OF AMERICA,
Northern District of Illinois,
Eastern Division, State of Illinois, County of Cook, ss:

George W. Stewart, being first duly sworn, says that he is the plaintiff in the above entitled cause, that the demand of the plaintiff therein is for money due upon the promissory note for one thousand (1,000) dollars of the defendant, dated July 25, 1911, and interest thereon, a copy whereof is attached to plaintiff's declaration reference being made thereto, and for moneys due from the defendant to plaintiff for his commission on the sale of divers properties of the defendant for the sum of one hundred twenty thousand (120,000) dollars at the commission of five (5 per cent. thereon being in the sum of six thousand (6,000) dollars, and that there is due to the plaintiff from the defendant, after allowing to him all just credits, deductions and set-offs, seven thousand (7,000) dollars and interest thereon as aforesaid.

GEORGE W. STEWART.

Subscribed and sworn to before me, this eighteenth day of May, A. D. 1914.

[SEAL.] MARY BOUSCAREN,
Notary Public in and for said County and State.

(Endorsed:) Filed May 18, 1914. T. C. MacMillan, Clerk.

13 And afterwards to-wit: on the first day of June, 1914, came the defendant in said entitled cause by his attorneys and entered his appearance in words and figures following to-wit:

Appearance.

DISTRICT COURT OF THE UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Gen. No. 31626.

GEORGE W. STEWART
vs.
CHARLES H. RAMSAY.

In Assumpsit.

Appearance.

We hereby enter the appearance of Charles H. Ramsay, and our appearance as his attorneys, for the sole purpose of quashing the service had and obtained upon the said Charles H. Ramsay, and for that purpose only.

DARROW, BAILY & SISSMAN.

(Endorsed:) Filed June 1, 1914. T. C. MacMillan, Clerk.

14 And afterwards to-wit: on the second day of June, 1914, came the defendant in said entitled cause by his attorneys and and filed in the Clerk's office of said Court, his certain Plea in Abatement in words and figures following to-wit:

Plea in Abatement.

In the United States District Court for the Northern District of Illinois, Eastern Division.

Gen. No. 31626.

GEORGE W. STEWART
vs.
CHARLES H. RAMSAY.

In Assumpsit.

Plea in Abatement.

The said Charles H. Ramsay in his own person comes and defends, etc., and says that before and at the time of the commencement of the said action of the said George W. Stewart, he, the said Charles H. Ramsay, was, and from thence hitherto has been and still is residing in the town of Greeley, State of Colorado, and that he, the said Charles H. Ramsay, was served with process in said action in the said Northern District of Illinois, while he, the said Charles

H. Ramsay was in attendance upon the District Court of the
15 United States for the Northern District of Illinois, being a witness and testified in the case wherein he, the said Charles H. Ramsay was plaintiff, and Andres E. Anderson was defendant, and the process was served upon him, the said Charles H. Ramsay while he was returning from the court-room of the Honorable George A. Carpenter, the trial judge, before whom he had testified, and said process was served on him in the corridor leading to the court room of the Honorable George A. Carpenter, and this he is ready to verify; wherefore he prays judgment if the court here will take cognizance of the action aforesaid.

CHAS. H. RAMSAY,
By PETER SISSMAN,
His Agent.

STATE OF ILLINOIS,
County of Cook, ss:

Peter Sissman being first duly sworn, upon oath, deposes and states that he is one of the attorneys for the said Charles H. Ramsay, defendant in the above entitled cause and that the plea as above set forth, is true in substance and in fact.

PETER SISSMAN.

Subscribed and sworn to before me, this 2nd day of June, A. D. 1914.

[SEAL.] WILLIAM L. CARLIN,
Notary Public.

(Endorsed:) Filed June 2, 1914. T. C. MacMillan, Clerk.

16 And on the same day to-wit: the second day of June, 1914, came the defendant in said entitled cause by his attorneys and filed in the clerk's office of said Court his certain Motion to quash service. Said Motion is in words and figures following to-wit:

Motion.

DISTRICT COURT OF THE UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Gen. No. 31626.

GEORGE W. STEWART
vs.
CHARLES H. RAMSAY.

In Assumpsit.

Motion.

Now comes Charles H. Ramsay by Darrow, Baily & Sissman, his attorneys, and moves the court to quash service had and obtained

upon the said Charles H. Ramsay for reasons assigned and set forth in the plea in abatement filed herein.

DARROW, BAILY & SISSMAN,
Attorneys for the Defendant.

(Endorsed:) Filed June 2, 1914. T. C. MacMillan, Clerk.

17 And afterwards to-wit: on the eighteenth day of March, 1915, came the plaintiff in said entitled cause by his attorney and filed in the clerk's office of said Court his certain demurrer to plea in words and figures following to-wit:

18 *Demurrer to Plea.*

In the United States District Court for the Northern District of Illinois, Eastern Division.

Gen. No. 31626.

GEORGE W. STEWART, Plaintiff,
vs.
CHARLES H. RAMSEY, Defendant.

In Assumpsit.

Demurrer to Plea.

And the plaintiff, as to the said plea of the defendant above pleaded, says that the said plea and the matters and things therein contained are not sufficient in law to quash the writ heretofore issued in the above entitled cause, and that he, the plaintiff, is under no duty of law to make answer thereto; and this he is ready to verify; Wherefore, for want of a sufficient plea in this behalf, the plaintiff prays the judgment of the Court here if the defendant ought not to make further answer to the declaration.

ROBERT C. FERGUS,
Plaintiff's Attorney.

19 I certify that, in my opinion, the foregoing demurrer of plaintiff to the plea of defendant is well founded in law, and proper to be filed in the above cause.

ROBERT C. FERGUS,
Plaintiff's Attorney.

UNITED STATES OF AMERICA,
Northern District of Illinois,
Eastern Division, ss:

STATE OF ILLINOIS,
County of Cook:

George W. Stewart, on oath states, that he is the plaintiff in the above entitled cause, and that he has read the foregoing demurrer

to said plea of defendant, and that said demurrer is not interposed for the purpose of delaying said cause, or any proceeding therein.

GEORGE W. STEWART.

Subscribed and sworn to before me, this seventeenth day of March, A. D. 1915.

[SEAL.] MARY BOUSCAREN,
Notary Public.

(Endorsed:) Filed March 18, 1915. T. C. MacMillan, Clerk.

20 And afterwards to-wit: on the twenty-fifth day of March, 1915, in the record of proceedings thereof in said entitled cause before the Hon. George A. Carpenter, Judge of said Court, appears the following entry to-wit.

21 In the United States District Court for the Northern District of Illinois, Eastern Division.

Gen. No. 31626.

GEORGE W. STEWART, Plaintiff,
vs.
CHARLES H. RAMSAY, Defendant.

This cause coming on to be heard upon the demurrer of the plaintiff to the defendant's plea in abatement, and the Court having heard the arguments of Counsel and being fully advised in the premises, and due deliberation being thereupon had, and it appearing to said Court that the plea in abatement and all other matters therein contained are sufficient in law to quash the plaintiff's writ; therefore it is considered that the said demurrer be overruled, and the plaintiff electing to stand by his demurrer, it is ordered that the said writ be quashed, and that the said defendant go hence without day. And it is further considered that the said defendant do recover against the plaintiff his costs and charges by him about his defense in this behalf expended to be taxed, and that the defendant have execution therefor; to which action of the Court and every of them, the plaintiff now here excepts.

____ ____,
Judge of the United States District Court.

Chicago, March 25, A. D. 1915.

22 And on the same day to-wit: the twenty-fifth day of March, 1915, came the plaintiff in said entitled cause by his attorney, and filed in the clerk's office of said Court his certain Petition for Writ of Error in words and figures following to-wit:

23 *Petition for Writ of Error.*

In the United States District Court for the Northern District of Illinois, Eastern Division.

No. 31626.

GEORGE W. STEWART, Plaintiff,
vs.
CHARLES H. RAMSAY, Defendant.

In Assumpsit.

Petition for Writ of Error.

George W. Stewart, plaintiff in the above entitled cause, (feeling himself aggrieved by the judgment and order of the United States District Court for the Northern District of Illinois, Eastern Division, rendered and granted on the 25th day of March, A. D. 1915, and filed in the Office of the Clerk of said United States District Court, in the above entitled cause, overruling the demurrer of plaintiff to the plea in abatement of defendant, and the Court thereupon ordering that the defendant go hence without day, and that he recover his costs therein and have execution therefor, and thereby holding that this Court has no jurisdiction of said cause), comes now by Robert C. Fergus, his attorney, and petitions said Court for an order allowing the plaintiff to prosecute a writ of error to the United States Supreme Court, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the plaintiff shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this Court be suspended until the determination of said writ of error by the United States Supreme Court. And your Petitioner will ever pray.

ROBERT C. FERGUS,
Attorney for Plaintiff.

(Endorsed:) Filed March 25, 1915. T. C. MacMillan, Clerk.

24 And on the same day to-wit: the twenty-fifth day of March, 1915, came the plaintiff in said entitled cause by his attorney and filed in the clerk's office of said Court his certain assignment of errors in words and figures following to-wit:

25 *Assignment of Errors.*

In the United States District Court for the Northern District of Illinois, Eastern Division.

No. 31626.

GEORGE W. STEWART, Plaintiff,
vs.
CHARLES H. RAMSAY, Defendant.

In Assumpsit.

Assignment of Errors.

Now comes the plaintiff and files the following assignment of errors which he will rely upon — his prosecution of the writ of error in the above entitled cause:

I.

That the United States District Court in and for the Northern District of Illinois erred in overruling the plaintiffs' demurrer to the plea in abatement;

II.

That the said Court erred in sustaining the plea in abatement, and holding that the Court had no jurisdiction of the cause;

III.

That the said Court erred in entering judgment in favor of the defendant and against the plaintiff on the plea in abatement, and dismissing and quashing the proceedings.

Wherefore, the plaintiff prays that the judgment of the said Court be reversed, and that the said case be remanded with directions to sustain the demurrer to the plea, and that the defendant be ruled to plead further.

ROBERT C. FERGUS,
Attorney for Plaintiff.

(Endorsed:) Filed March 25, 1915. T. C. MacMillan, Clerk.

26 And on the same day to-wit: the twenty-fifth day of March, 1915, in the record of proceedings thereof in said entitled cause before the Hon. George A. Carpenter, Judge of said Court, appears the following entry to-wit:

27 *Order Allowing Writ of Error.*

At a Stated Term, to-wit, the March Term, A. D. 1915, of the District Court of the United States of America, of the Seventh Judicial Circuit, in and for the Northern District of Illinois, Eastern Division, Held at the Court Room in the City of Chicago, on Thursday, the 25th Day of March, A. D. 1915.

Present: The Honorable George A. Carpenter, District Judge.

No. 31626.

GEORGE W. STEWART, Plaintiff,
vs.
CHARLES H. RAMSAY, Defendant.

In Assumpsit.

Upon motion of plaintiff by Robert C. Fergus, his attorney, and upon filing a Petition for Writ of Error and an Assignment of Errors,

It is ordered That a Writ of Error be and hereby is allowed to have reviewed in the United States Supreme Court the judgment heretofore entered herein, and that the amount of bond on said Writ of error be and hereby is fixed at the sum of Two Hundred (200) Dollars.

And the Court here certifies that the only issue raised in said cause and passed upon by the Court was the question of jurisdiction of the Court as presented by the pleadings herein.

—— ——.

Chicago, March 25, A. D. 1915.

27½ And on the same day to-wit: the twenty-fifth day of March, 1915, there was filed in the Clerk's office of said Court in said entitled cause a certain Bond in words and figures following to-wit:

28 Know all Men by these Presents, That we, George W. Stewart, as principal, and Chicago Bonding and Surety Company, as sureties, are held and firmly bound unto Charles H. Ramsay, in the full and just sum of Two Hundred (200) Dollars, to be paid to the said Charles H. Ramsay, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this twenty-fifth day of March, in the year of our Lord one thousand nine hundred and fifteen (1915).

Whereas, lately at a Term of Court, to-wit: the March Term, A. D. 1915, of the United States District Court, for the Northern District of Illinois, Eastern Division, in a suit depending in said Court, be-

tween George W. Stewart, as plaintiff and Charles H. Ramsay, as defendant, a Judgment was rendered against the said George W. Stewart, and the said George W. Stewart, having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the Judgment in the aforesaid suit, and a citation directed to the said Charles H. Ramsay, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington within 30 days from the date thereof,

Now, the condition of the above obligation is such, That if the said George W. Stewart shall prosecute his writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the avove obligation to be void; else to remain in full force and virtue.

GEORGE W. STEWART. [SEAL.]
CHICAGO BONDING AND SURETY COMPANY, [SEAL.]
By WALTER FARADAY, [SEAL.]
Attorney in Fact.

Sealed and delivered in presence of—

RALPH D. PARKER.
KARL E. HILTHON.
[SEAL.]

Approved by—

— CARPENTER,
Judge of the United States District Court.

25 Mch., 1915.

(Endorsed:) Filed Mar. 25, 1915. T. C. MacMillan, Clerk.

29 *Præcipe for Transcript of Record.*

In the District Court of the United States for the Northern District of Illinois, Eastern Division.

31626.

GEORGE W. STEWART, Plaintiff,
vs.
CHARLES H. RAMSAY, Defendant.

To the Clerk of the above-entitled Court:

You will please prepare a transcript of the record in this Cause; to be filed in the office of the Clerk of the Supreme Court of the United States, under the Writ of Error allowed to said Court, and include in the said transcript the following pleadings, proceedings and papers on file, to-wit:

Præcipe, filed March 28, 1914.
Summons and Marshal's return thereon endorsed;
Declaration, filed May 18, 1914;
Appearance of Attorneys for defendant, filed June 1, 1914;
Plea in Abatement, filed June 2, 1914;
Motion, filed June 2, 1914;
Demurrer to Plea, filed March 18, 1915;
Order overruling Demurrer, entered of record March 25, 1915;
Petition for Writ of Error, filed March 25, 1915;
Assignment of Errors, filed March 25, 1915;
Order of March 25, 1915, allowing Writ of Error;
Bond on Writ of Error.

ROBERT C. FERGUS,
Attorney for Plaintiff.

(Endorsed:) Filed March 25, 1915. T. C. MacMillan, Clerk.

30 NORTHERN DISTRICT OF ILLINOIS,
Eastern Division, ss:

I, T. C. MacMillan, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record in said Court, made in accordance with Præcipe, filed in the cause entitled George W. Stewart vs. Charles H. Ramsay, as the same appear from the original records and files thereof, now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at my office, in the City of Chicago, in said District, this twenty-ninth day of March, 1915.

[Seal of Dist. Court U S., Northern Dist. Illinois, 1855.]

T. C. MACMILLAN, *Clerk,*
By JOHN H. R. JAMAR,
Deputy Clerk.

31 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the District Court of the United States for the Northern District of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between George W. Stewart, Plaintiff, and Charles H. Ramsay, Defendant, a manifest error hath happened, to the great damage of the said George W. Stewart, Plaintiff, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full adn speedy justice done to the parties afore-

said in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-fifth day of March, in the year of our Lord one thousand nine hundred and fifteen.

[Seal of Dist. Court U S., Northern Dist. Illinois, 1855.]

T. C. MACMILLAN,
Clerk of the District Court of the United States
for the Northern Dist. of Illinois.

Allowed by—

GEORGE A. CARPENTER,
District Judge.

[Endorsed:] 31626. Supreme Court of the United States. George W. Stewart vs. Charles H. Ramsay. Writ of Error. Filed Mch. 25, 1815. T. C. MacMillan, Clerk. Copy deposited for the defendant in error in the Clerk's Office, U. S. District Court, Northern District of Illinois.

32 UNITED STATES OF AMERICA, *ss:*

To Charles H. Ramsay, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a Writ of Error, filed in the Clerk's Office of the District Court of the United States for the Northern District of Illinois, wherein George W. Stewart, is Plaintiff in Error, and you are Defendant in Error, to show cause, if any there be, why the Judgment rendered against the said Plaintiff in Error as in the said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable George A. Carpenter this twenty fifth day of March, in the year of our Lord one thousand nine hundred and fifteen.

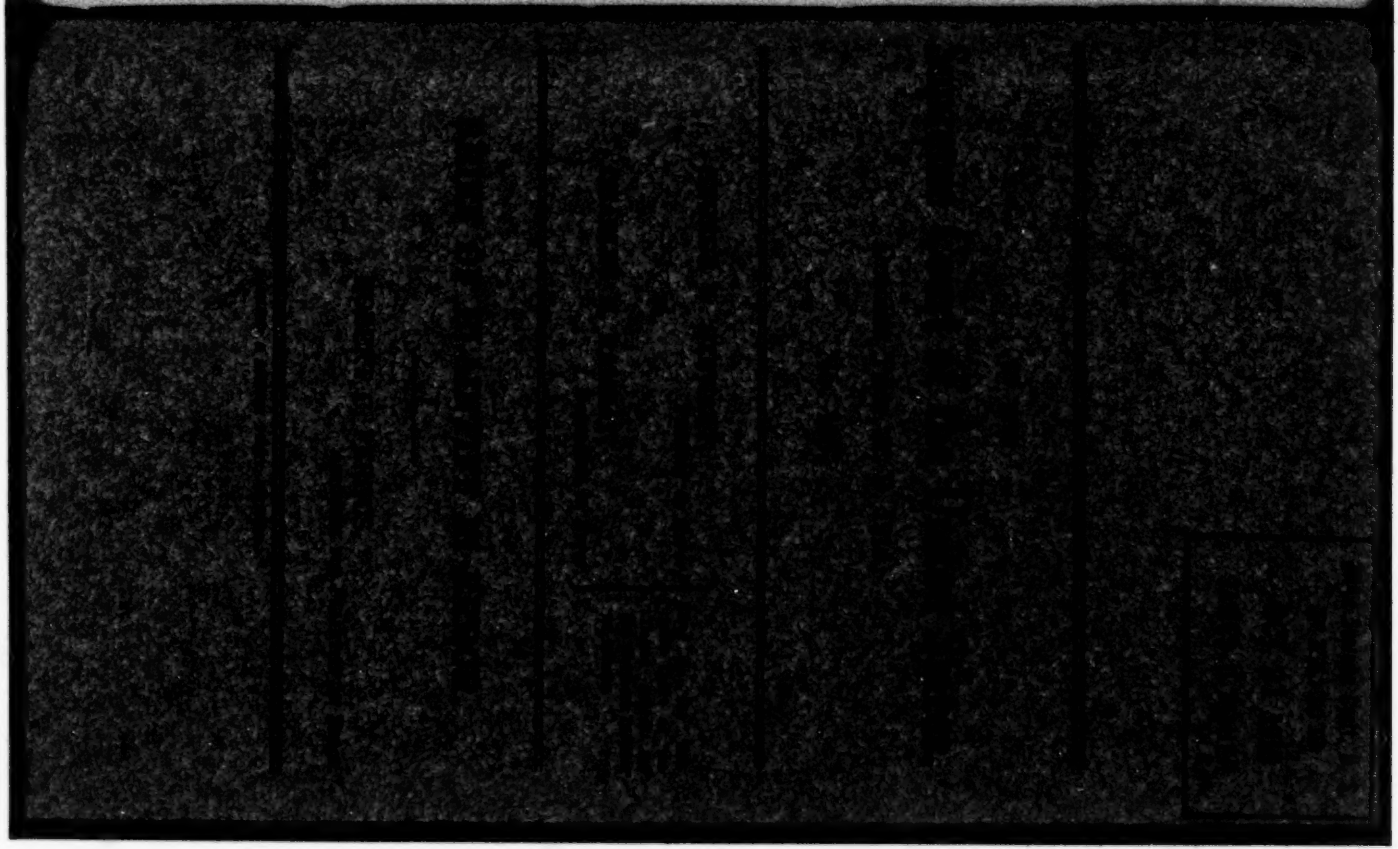
GEORGE A. CARPENTER, *Judge.*

Received a copy of the above Citation, this 29th day of March, A. D. 1915.

CLARENCE S. DARROW,
Attorneys for Charles H. Ramsay, the Defendant.

33 [Endorsed:] No. 31626. Supreme Court of the United States. George W. Stewart vs. Charles H. Ramsay. Citation to the Supreme Court of the United States. Filed Mar. 30, 1915, at — o'clock — M. T. C. MacMillan, Clerk.

Endorsed on cover: File No. 24,660. N. Illinois D. C. U. S. Term No. 105. George W. Stewart, plaintiff in error, vs. Charles H. Ramsay. Filed April 7th, 1915. File No. 24,660.



SUBJECT INDEX.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1916.

No. 105.

GEORGE W. STEWART,
Plaintiff in Error,
vs.
CHARLES H. RAMSAY,
Defendant in Error.

Error to the District Court of the United States for the Northern District of Illinois.

BRIEF OF PLAINTIFF IN ERROR.

This is a writ of error brought to reverse the final judgment of the District Court, overruling the general demurrer of plaintiff to the plea in abatement of defendant, and to remand this cause with directions to sustain the demurrer to the plea and that defendant be ruled to plead further (13).

The case comes here under s. 238, Judicial Code, Act of March 3, 1911, c. 231, 36 Stat. 1157, and the question of jurisdiction is certified (14).

The case was brought in the district of the residence of the plaintiff under s. 51, Judicial Code, Act of March 3, 1911, c. 231, 36 Stat. 1101.

The jurisdiction was invoked upon the ground that the suit was between citizens of different states, and that the matter in controversy exceeded the sum of three thousand dollars (Judicial Code, s. 24, Act of March 3, 1911, c. 231, 36 Stat. 1091).

NOTE—The exemption of a suitor or witness *eundo, morando, redeundo,* is the privilege referred to herein, and the words exemption, privilege, right, are so used in each and every instance of the within text.

NOTE—Figures refer to pages of printed transcript of record.

STATEMENT OF CASE

AS TO JURISDICTION OF DEFENDANT IN ERROR RAMSAY.

George W. Stewart is plaintiff in error in this case and a citizen of Illinois and a resident of the Northern District of Illinois, and Charles H. Ramsay is defendant in error and a citizen and resident of Colorado (3).

Stewart as plaintiff herein brought suit in assumpsit against said Ramsay as defendant in the District Court of the United States for the Northern District of Illinois to recover both on the note of said Ramsay and for commissions in the sum of $7,000.00 due by said Ramsay to said Stewart, and declaration with several counts therefor was filed (3, 4, 5, 6).

Praecipe was filed (1) and summons thereon against said Charles H. Ramsay, defendant, issued to the Marshal of said District Court, and his due return thereon was made of personal service on said Charles H. Ramsay, defendant (2).

Defendant Charles H. Ramsay then filed his limited appearance for the sole purpose of quashing the service herein (8), and filed also both a written motion to quash service herein, and his plea in abatement claiming privilege from service of summons in this case while he was in attendance upon said District Court as plaintiff and witness in the case of

himself, Charles H. Ramsay, plaintiff, against Andres E. Anderson, defendant, and that the summons herein was served upon him, Charles H. Ramsay, defendant, while he was returning from the court-room of the trial judge before whom he had as plaintiff aforesaid in his own case testified, and that he was served in the corridor leading to the court-room (8, 9).

Plaintiff Stewart filed general demurrer denying the exemption of Defendant Ramsay herein from service of summons (10).

The Court overruled the demurrer (11), Stewart as plaintiff stands by his demurrer (11), judgment entered against plaintiff for costs (11), and this writ of error sued out (11) and allowed (14) to review that judgment.

ASSIGNMENT OF ERRORS.

I.

That the United States District Court in and for the Northern District of Illinois erred in overruling the plaintiff in error's demurrer to the plea in abatement;

II.

That the said Court erred in sustaining the plea in abatement, and holding that the Court had no jurisdiction of the cause;

III.

That the said Court erred in entering judgment in favor of the defendant in error, and against the plaintiff in error on the plea in abatement, and dismissing and quashing the proceedings.

BRIEF OF THE ARGUMENT.

I.

The law of privilege of a non-resident suitor or witness is that he is exempt only from arrest, and that he is not exempt from the service of summons, in a civil suit.

The law, by law of exemption, is that the privilege extends only to an exemption from arrest:

Blight's Executor v. *Fisher and Ashley*, 1 Peters' C. C. R., 41.

Clerk v. *Molineaux*, Raymond's R., 101.

Walpole v. *Alexander*, 3 Douglas' R., 45 (Lord Mansfield).

Lightfoot v. *Cameron*, 2 W. Blackstone, R., 1113.

1 Sellen's Practice, 131.

6 Comyns' Digest, 88.

Starret's Case, 1 Dallas, 355.

Bishop v. *Vose*, 27 Conn., 12.

Baldwin v. *Emerson*, 16 R. I., 308.

Wilkins v. *Brock*, 79 Vt. 57.

Greer v. *Young*, 120 Ill., 187-8.

Thompson's Case, 122 Mass., 428 (1877, Gray, C. J.).

Longueville v. *May*, 115 Iowa, 711.

Phillips v. *Browne*, 270 Ill., 456 (October, 1915).

Worth v. *Norton*, 56 S. C., 56.

A law without law—by caprice, by unwarranted power, by error, is the decision *contra* in

Parker v. *Hotchkiss,* 1 Wallace Jr.'s C. C. R., 271.

And all decisions on exemption following the precedent of *Parker* v. *Hotchkiss, supra,* are in error, because a law without law.

All exemptions from territorial jurisdiction must be derived from the consent of the sovereign of the territory.

The Schooner Exchange v. *McFadden,* 7 Cranch, 143 (Marshall, C. J.).

II.

The privilege is not that of the Court, except in cases of contempt of court.

The service of summons herein is not a contempt of court—hence the privilege is not that of the Court.

Blight's Executor v. *Fisher and Ashley,* 1 Peter's C. C. R., 41.

Bishop v. *Vose,* 27 Conn., 11.

Wilkins v. *Brock,* 79 Vt., 60.

Greer v. *Young,* 120 Ill., 184.

The privilege is personal in a suitor or witness to be waived or claimed by him.

Goldey v. *Morning News,* 156 U. S., 521.

Geyer's Lessee v. *Irwin,* 4 Dallas, 107.

III.

The privilege is not allowed a non-resident plaintiff, conceding the privilege to apply to a non-resident defendant, served with summons in a civil suit.

Bishop v. *Vose,* 27 Conn., 11.

Wilson Sewing Machine Company v. *Wilson,* 22 F., 804 (District of Connecticut).

Guynn v. *McDaneld,* 4 Idaho, 605.

Skinner & Mounce Co. v. *Waite,* 155 F., 830: (citing *Guynn* v. *McDaneld, supra,*) suggesting possible distinction between non-resident defendant and non-resident plaintiff.

ARGUMENT.

To the Court, we present and support the following propositions of law:

I.

That the law of privilege of a non-resident suitor or witness is that he is exempt only from arrest; and

That he is not exempt from service of summons in a civil suit.

II.

That the privilege is not that of the Court except in cases of contempt of court, and

That the privilege is personal in a suitor or witness to be waived or claimed by him.

III.

That the privilege is not allowed a non-resident plaintiff, conceding the privilege to apply to a non-resident defendant, served with summons in a civil suit.

We call the attention of the Court to the fact that the case comes here, free from

Fraud, trickery, artifice,
Contempt of court,

and free from questions thereon so often found in the reported cases where the privilege claimed has been before the courts for review.

I.

The law of privilege is the sole question before the Court.

The question to be decided is:

Does the law of privilege of a non-resident suitor or witness, *eundo, morando, redeundo,* exempt him from service of a summons in a civil suit?

The Constitution and acts of Congress, and the laws of Illinois, do not contain any provisions thereon that we have found in our search except

The constitutional clauses exempting senators and representatives from arrest, in the

Constitution of the U. S., Art. I, s. 6, 1.

Constitution of Illinois (1870), Art. IV, s. 14,

and the exemption therein from arrest does not include exemption from the service of civil process; these are the words of the Court:

"We concur in the holding in those cases that

the exemption granted is an exemption from arrest with a view to imprisonment, and nothing else."

Phillips v. *Browne,* 270 Ill., 456 (October, 1915).

Following the rule at Common Law, Mr. Justice Bushrod Washington declared in 1809:

"The privilege of a suitor or witness extends only to an exemption from arrest. The privilege claimed being in derogation of the right of the other party to sue," and also

"The writers, who speak upon this subject, confine the privilege of suitors and witnesses to exemption from arrest, and not a dictum to the contrary is to be found," see pages 42 and 43,

Blight's Executor v. *Fisher and Ashley,* 1 Peters C. C. R.

A leading case at Common Law is

Clerk v. *Molineaux,* Raymond's R., 101.

See Brief, Part I, for other authorities.

The opinion of Mr. Justice Washington remained the uniform rule from 1809 to 1849, when a conflict thereon arose in *Parker* v. *Hotchkiss,* 1 Wallace Jr.'s C. C. R., 271.

The judicial eminence and authority of Mr. Justice Washington are shown by the records of this Court: for thirty-one years (1798-1829) he was an Associate Justice of this Court, and John Marshall served as Chief Justice with him during twenty-eight years of that period (1801-1829).

Following his own rule, in 1849 Mr. Justice Kane overruled Mr. Justice Washington and declared

> "It is said the practice of this Court since the decision in *Blight* v. *Fisher* in 1809 (Peters' Circuit Court Reports, 41) has been uniform, to discharge in such cases as this from arrest under *capias*, but not to set aside the service of summons. I confess I have never apprehended the reason of this distinction, and when it was pressed upon me by counsel for the plaintiff, I did not disguise my reluctance to accede to it. My instinctive respect for all opinions expressed by Judge Washington, alone made me hesitate," in
>
> *Parker* v. *Hotchkiss*, 1 Wallace Jr.'s C. C. R., 269.

Therein for his authorities, Mr. Justice Kane cited the following cases:

Starret's Case, 1 Dallas, 355, this case supports absolutely the opinion *supra* of Mr. Justice Washington. Case not in point, an arrest on a judgment.

Hayes v. *Shields*, 1 Yeates, 222, (following *Bolton* v. *Martin*, Dall., 296, the case of the member of Convention); these cases relate to privilege by members standing in public stations, but do not relate to privilege of a private suitor or witness.

Miles v. *McCullough*, 1 Binney, 77, the suitor was not a non-resident of the state, but a resident.

Halsey v. *Stewart*, 1 Southard, 366 (citing *Miles* v. *McCullough*, 1 Binney, 77) extends the privilege without authority to a non-resident served with summons.

By the authorities submitted, *supra:*

We maintain that the opinion of Mr. Justice Kane in *Parker* v. *Hotchkiss,* 1 Wallace Jr's C. C. R., 269, is not the law, by the law of exemption, but is a law without law—by caprice, by unwarranted power, by error. And

We maintain that all decisions following the rule in *Parker* v. *Hotchkiss supra* are also in error, and that the privilege declared therein is not the law.

Following *Parker* v. *Hotchkiss,* the Federal Circuit and District Courts have generally held the privilege to include exemption from summons. Representative opinions of the Federal rule and the reasons for the exemption from service of summons are:

Hale v. *Wharton,* 73 F. 742.
Skinner & Mounce Co. v. *Waite,* 155 F. 828.

The reason for the decision is thus stated in *Hale* v. *Wharton,* 73 F. 741:

> "This rule is buttressed with the high conception that as courts are established for the ascertainment of the whole truth, and the doing of exact justice, as far as human judgment can attain, in disputes between litigants, every extraneous influence which tends to interfere with or obstruct the trial for the attainment of this sublime end should be resisted by the ministers of justice to the last legitimate extremity in the exercise of judicial power.
>
> "Hence, as 'One of the necessities of the administration of justice' (*Person* v. *Grier,* 66 N. Y. 124), the rule has come to be regarded as the privilege of the Court, as affecting its dignity and authority, and rests, therefore, upon sound public policy. *Parker* v. *Hotchkiss, supra.*"

We ask the Court:

Does the mere reading of a summons in a civil suit on a suitor or witness "tend to interfere with or obstruct the trial" "for the ascertainment of the whole truth and the doing of exact justice?"

Where is the positive law to support this general rule?

Commenting upon the word "arrest" in the Federal Constitution, in the clause exemption "from arrest,"

The Supreme Court of South Carolina say:

> "No court, therefore, has any authority, from its own views of public policy, to stretch that word beyond its usual and accepted significance. It can not for a moment be supposed that the framers of the Constitution were ignorant of the wide difference between arresting the person of a debtor and simply serving him with a summons to answer a civil action, which is, practically, nothing more than a mere notice. It would, therefore, be wholly unwarranted for a court to put such a construction upon the language found in the Constitution as would make the exception conferred apply to two such very different things," in

Worth v. *Norton,* 56 S. C., 64.

> "All exemptions from territorial jurisdiction, must be derived from the *consent* of the sovereign of the territory; that this consent may be implied or expressed,"

The Schooner Exchange v. *McFadden,* 7 Cranch, 143.

What is the meaning of *consent* intended by Chief Justice Marshall in the words just quoted?

Is it not that the Constitution or acts of Congress only may grant a general exemption to a non-resident suitor or witness in the Federal Courts of the United States?

II.

The reason for his decision, in including also in the privilege an exemption from service of a summons, was thus stated by Judge Kane:

> "The privilege which is asserted here is the privilege of the Court, rather than of the defendant."
>
> *Parker* v. *Hotchkiss,* 1 Wallace Jr.'s C. C. R., 272.

The root of the conflict, appears to be, that the privilege is the privilege of the Court.

The service of summons herein is not a Contempt of Court—hence the privilege is not that of the Court.

> *Blight's Executor* v. *Fisher and Ashley,* 1 Peters' C. C. R., 41.
>
> See Brief, Part II, for other authorities.

The defendant in error herein is not a public official exempted by the laws of Illinois, as was the defendant by the laws of Pennsylvania and as commented upon by Mr. Justice Washington, in *Blight's Executor* v. *Fisher and Ashley,* 1 Peters' C. C. R., 43.

The defendant in error herein is a private citizen.

It is error to call the privilege of a private suitor

or witness that of the Court, that is, like or analogous to the privilege of Court called a contempt of Court, or the privilege of a public official.

A privilege of the Court, a contempt of Court, being a matter inherent in the Court, is exclusive in the Court for determination. A waiver of a privilege of Court by a party or witness is impossible.

The privilege of a suitor or witness is a legal right in him, capable of being waived by him in the first instance, without the knowledge of the Court.

Goldey v. *Morning News,* 156 U. S. 521.
Geyer's Lessee v. *Irwin,* 4 Dallas, 107.

The Court may not, *ex-officio,* take notice of the privilege of a suitor or witness.

Geyer's Lessee v. *Irwin,* 4 Dallas, 107.
Prentis v. *Commonwealth,* 5 Randolph, 699.

Under the facts in this case, the privilege is a legal right and personal in its nature in the suitor or witness, and may be waived.

The privilege of the Court herein has no application.

The reply of the Supreme Court of Rhode Island, to those decisions holding that the exemption of a suitor or witness extends to a service of summons for the purposes of justice, is:

> "We think it would rarely happen that the attention of a non-resident plaintiff or defendant would be so distracted by the mere service of a summons from the immediate business in hand in prosecuting or defending a pending suit that the interests of justice would suffer in conse-

quence, or that the liability to such service would often deter them from prosecuting and defending their just claims or rights. The reasons for the exemption would apply equally as well to resident as to non-resident suitors, and it has never been deemed necessary to exempt resident suitors from the service of a summons so far as we have been able to find, except in the single state of Pennsylvania. We think these reasons are fanciful, rather than substantial." And authorities cited.

Baldwin v. *Emerson*, 16 R. I. 308.

III.

Defendant in error was a citizen of Colorado and came to the City of Chicago, in the state of Illinois, and brought suit, in the United States Court for the Northern District of Illinois, by the style of *Charles H. Ramsay* v. *Andres E. Anderson*, defendant, and while attending upon said suit in Chicago as plaintiff, he was served as defendant herein with summons.

We contend that a non-resident plaintiff is not entitled to the exemption from service of a summons, *assuming* such exemption is allowed a non-resident defendant.

Such was held to be the law in *Bishop* v. *Vose*, 27 Conn., 13, where the Court said "there is no principle of comity or public policy to be derived from them" (the decisions) "which will sustain the doctrine claimed by the defendants" (exemption from service of summons by non-resident plaintiff).

And the holding of the Supreme Court of Connec-

ticut in *Bishop* v. *Vose, supra,* was commented on by Judge Shipman, as follows,

> "There is, perhaps, a reason why a plaintiff who has voluntarily sought the aid and protection of our courts should not shrink from being subjected to their control, which does not apply to the condition of a defendant whose attendance is compulsory, and therefore I do not intend to express dissent from the doctrine of the Connecticut case, but to limit this decision to the facts which are before me," in
>
> *The Wilson Sewing Machine Company* v. *Wilson,* 22 F. 804, (United States Circuit Court, District of Connecticut, December 1884, also reported in 51 Conn., 597).

In *Guynn* v. *McDaneld,* 4 Idaho, 605, held, a non-resident plaintiff in a suit brought by him in Idaho against his debtor, a resident of Idaho, is not exempt from service of a summons in an action commenced by his debtor against said non-resident plaintiff in the district Court of Idaho. The Court says on page 609,

> "If the courts of Idaho can, in the opinion of a litigant, protect his rights in one case, it would seem they ought to be equally adequate in another."

The language of the Court in *Skinner* v. *Waite,* 155 F., 831, is:

> "Under some circumstances, at least, there would appear to be a material distinction between the right of exemption of one who of choice goes into a jurisdiction for the purpose of enforcing a claim and the right of one who is compelled to come into a foreign jurisdiction to protect himself against a claim which is being made upon him in a suit to which he is defendant."

We ask the Court,

When a non-resident plaintiff brings suit against a resident of the State, and such non-resident plaintiff is then sued there by his debtor or another person, and the exemption from service of the summons is claimed and is allowed,

What becomes of the principles of waiver and legal estoppel and public policy? applicable to such non-resident plaintiff as we see it by his voluntary election in going to a foreign state and bringing there his suit as plaintiff.

WHERE ONE IS BOTH PLAINTIFF AND WITNESS.

We make the following point:

In reply to the issue raised by the defendant in error herein in his proof of facts in his plea of abatement, that he was both the plaintiff and witness in the case of himself, to-wit, *Charles H. Ramsay* v. *Andres E. Anderson,* when served with summons herein:

The whole includes the part; that if the exemption shall not be granted by this Court to him as plaintiff herein, then that the defendant in error has no right to an exemption herein as a witness, because his whole right is that of plaintiff and necessarily includes that of witness. Or, to reverse the proposition, the defendant in error could not be a witness in his own cause as plaintiff unless he was the plaintiff.

We submit in conclusion:

I.

That the law of privilege is an exemption from arrest only,

That the privilege does not include an exemption from service of summons, provided there is no contempt of court;

II.

That the privilege is personal in a suitor or witness only, except in cases of contempt of court;

III.

That the privilege is not allowed a non-resident plaintiff, assuming that the privilege is allowed a non-resident defendant.

ROBERT C. FERGUS,
For Plaintiff in Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1916.

No. 105.

GEORGE W. STEWART, Plaintiff in Error, vs. CHARLES H. RAMSAY, Defendant in Error.	Error to the District Court of the United States for the Northern District of Illinois.

BRIEF OF DEFENDANT IN ERROR.

BRIEF OF THE ARGUMENT.

I.

The law as to the privilege or immunity of non-resident suitors or witnesses embraces and includes immunity from service of summons in civil suits, as well as exemption from arrest.

Greenleaf on Evidence, Vol. 1, p. 434, and cases cited.

Troubart and Haley's Practice, par. 236 and cases cited.

Cyclopedia of Law and Proc., Vol. 32, p. 492.

Kaufman v. *Garner* (C. C.), 173 Fed., 550.

Hale v. *Wharton*, 73 Fed., 739.

Mechanical Appl. Co. v. *Castleman*, 215 U. S., 437.

Cain v. *Commercial Publ. Co.*, 232 U. S., 124.

II.

The privilege or immunity in question is accorded to parties plaintiff as well as parties defendant.

Roschynialiki v. *Hale*, 201 Fed., 1017.
Hale v. *Wharton*, 73 Fed., 739.
Fisk v. *Westover*, U. S. D., 233.
Roberts v. *Thompson*, 134 N. Y. Suppl., 363.
Parker v. *Marco*, 136 N. Y. Suppl., 585.

III.

The privilege or immunity is personal to the suitor or witness, and is based on fundamental considerations of public policy and the impartial and efficient administration of justice.

U. S. v. *Edme*, 9 Serg. & R., 147.
Re Healey, 53 Vt., 694.
Person v. *Grier*, 66 N. Y., 124.
Halsey v. *Stewart*, 4 N. J. Law, 366.
Brown v. *Getchell*, 11 Mass., 11.
Andrew v. *Lembeck*, 46 Ohio St., 38.

VI.

The privilege or immunity is not based on any statute or specific provision in the Federal or State Constitutions, but is a common-law privilege firmly established and consistently applied in the courts of the United States as well as in the great majority of our states.

Smith v. *Alabama*, 124 U. S., 591.

ARGUMENT.

We respectfully submit to this Honorable Court the following propositions of law:

I.

Suitors, as well as witnesses, coming from foreign jurisdictions for the sole purpose of attending court, whether under summons, or subpoena, or not, are held immune from service of civil process while engaged in such attendance, and for a reasonable time in coming and going.

II.

This privilege or exemption extends to non-resident plaintiffs, as well as to non-resident defendants, whether the former are also witnesses in the suit or not.

III.

This privilege or exemption is personal in the suitor or witness, and is based upon fundamental considerations essential to the efficient and even-handed administration of law and justice.

I.

THE NATURE OF THE PRIVILEGE AND THE GROUNDS FOR IT.

The question presented to the court in this case is very simple, involving the privilege or exemption of a non-resident plaintiff, in a civil suit, from service of a summons in another civil suit, while such plaintiff is attending court in another jurisdiction for the sole purpose of testifying as a witness in his own behalf and advising his attorney with reference to the proper prosecution of his suit.

We respectfully submit that the law on this question has long been well established, especially in the Federal Courts, and is absolutely free from doubt. We do not think it necessary or proper to trespass unduly on the time and attention of this court by arguing the points involved at any considerable length. It is plain to us that counsel for the plaintiff in error proceeds on the theory that, although the law of privilege or exemption has long been firmly established, the grounds for it have never really received sufficient consideration in this or any other high court, and that if the matter were discussed *de novo*, and on principle, all the innumerable precedents and authorities which establish the privilege in question would be deliberately and sweepingly reversed, at least in so far as non-resident plaintiffs in civil suits are concerned. This ambition of counsel to reopen the question may be laudable, but we hardly think that this court will concur in the view that during the centuries in which the law of privilege or exemption has been developed

and applied no court of high authority has given the question the full and thorough consideration that it demands.

In the Cyc. of L. & P., Vol. 32, P. 492, the rule is stated as follows:

> "SERVICES ON SUITORS AND WITNESSES. Suitors and witnesses coming from foreign jurisdictions for the sole purpose of attending court, whether under summons or subpoena or not, are usually held immune from service of civil process while engaged in such attendance and for a reasonable time in coming and going."

The citations in the footnotes to this statement of law include decisions by the Supreme Courts of the States of New York, New Jersey, Michigan, Wisconsin, Ohio, Pennsylvania, Kansas, Indiana, Iowa, California, Minnesota, New Hampshire, Tennessee, etc., as well as decisions by many Federal courts, including this Honorable Court.

In Troubart and Halsey's Practice, para. 236, the doctrine of privilege is stated as follows:

> "The parties to a suit, their attorneys, counsel and witnesses, are, for the sake of public justice, privileged from arrest in coming to, attending upon and returning from the court. * * * And the privilege extends to the service of a summons as well as a capias. * * * The common-law term 'privilege from arrest' is, with us, substantially the same as privilege from suit."

Also:

Greenleaf on Evidence, Vol 1, pages 431-4.

The grounds for the privilege or exemption have been stated so often and so admirably by the highest courts, that the only difficulty one encounters in attempting citations is the one described as the "embarrassment of riches." The following statement and opinion in *Roschynialski* v. *Hale*, a case tried by the U. S. District Court in the Nebraska District, in January, 1913, covers the ground fully:

"The defendant was served with a summons issued in an action begun in the State court. He removed the action to this court, and has presented a plea to the jurisdiction. The petition was filed in the State court in March, 1912, and the summons was issued and served on July 25, 1912, while the defendant was in the county where the action was begun. The defendant, at the date of filing the petition and ever since, has been a resident of another state. At the date of the issuance of the summons in this case there was pending in the same county an action in replevin, wherein the defendant in this action was plaintiff. That action was about to be tried. The defendant had come from another state, bringing the body of a deceased relative for interment in another county in this State, and as soon as that duty was performed he was induced to go to the county where the action was brought, in pursuance of an agreement between the attorneys for the parties in the replevin action that his deposition should be taken there, before a Notary Public, as a witness on his own behalf in the replevin action. His deposition was so taken, and the summons in this action was served on defendant, within a few minutes of

the time he concluded his testimony, and before he had a reasonable time to depart for his home. Under the Civil Code of Nebraska, the defendant was not exempt from service of summons, on the ground that he was a non-resident of the State or of the county, as he was in the county when the summons was issued and served, although the petition was filed before he came into the county.

"(1) Was the defendant privileged from service of this process because of his attendance as a witness, to give his deposition in another action? There appears to be no decision by a United States court directly upon this point. The privilege of suitors and witness from service of process is not founded upon any statute in this State, and as it is a question of general jurisprudence, a definition of the common-law privilege, it is the duty of this court to decide the question by the exercise of its independent judgment.

Hale v. *Wharton et al.* (C. C.), 73 Fed., 739-746.

Skinner & Mounce Co. v. *Waite et al.* (C. C.), 155 Fed., 828-831.

Kaufman v. *Garner* (C. C.), 173 Fed., 550-552.

"(2) The reason why this privilege is extended to suitors and witnesses has often been stated. It is to secure them the right to give testimony and assistance in the trial of an action, unhindered by exposure to suits by reason of their presence upon the court. The rule is founded in public policy, and is for the benefit of the court, as well as of the parties. Its application has been illustrated by many

decisions of the United States courts, exhibiting a liberal interpretation in favor of the privilege.

Parker v. *Hotchkiss,* 1 Wall. Jr., 269; Fed. Cas. No. 10,739.

Lyell v. *Goodwin,* Fed. Cas. No. 8,616.

U. S. v. *Bridgman et al.,* Fed. Cas. No. 14,645.

Brooks et al. v. *Farwell et al.* (C. C.), 4 Fed., 166.

Bridges v. *Sheldon* (C. C.), 7 Fed., 17, 44.

Plimpton v. *Winslow* (C. C.), 9 Fed., 365.

Atchison v. *Morris* (C. C.), 11 Fed., 582.

Larned v. *Griffin* (C. C.), 12 Fed., 590.

Nichols v. *Horton* (C. C.), 14 Fed., 327.

Wilson Sewing Mach. Co. v. *Wilson* (C. C.), 22 Fed., 803.

Small v. *Montgomery* (C. C.), 23 Fed., 707.

Ex parte Schulenburg (C. C.), 25 Fed., 211.

Kauffman v. *Kennedy* (C. C.), 25 Fed., 785.

Holyoke & South Hadley Falls Ice Co. v. *Ambden* (C. C.), 55 Fed., 593.

Kinne et al. v. *Lant* (C. C.), 68 Fed., 436.

Hale v. *Wharton et al., supra.*

Morrow v. *U. H. Dudley & Co.* (D. C.), 114 Fed., 441.

Skinner & Mounce Co. v. *Waite et al., supra.*

Peet v. *Fowler* (C. C.), 170 Fed., 618.

Kaufman v. *Garner, supra.*"

II.

PARTIES PLAINTIFF ACCORDED THE PRIVILEGE.

Counsel for the plaintiff in error contends that even if it be admitted that defendants and witnesses are entitled to the immunity or exemption in question, there is no reason why parties plaintiff—whether they testify as witnesses in their own behalf or not—should be accorded the privilege. Parties plaintiff, counsel argues, of their own free will submit themselves to the jurisdiction of the courts of the State wherein they bring their suits, and cannot complain that the service of a summons in another civil suit distracts, embarrasses or defeats their purpose.

There is no ground or warrant for this distinction, although there are a few decisions—none well considered—in which an attempt is made to justify it. The overwhelming weight of authority is unquestionably the other way. Every careful or thoughtful statement of the grounds for the privilege clearly applies to parties plaintiff as well as to parties defendant. Every text-book of weight or consequence lays down the doctrine in terms that broadly include "suitors" "parties," as well as witnesses, of every description. *In the Federal Courts no distinction has ever been made as to the privilege of exemption between parties plaintiff and parties defendant.*

In *Hale* v. *Wharton*, 73 Fed., 739, the court said:

> "It is, perhaps, not too much to say that no rule of practice is more firmly rooted in the jurisprudence of the United States courts than

> that of the exemption of persons from the writ of arrest and of summons while attending upon courts of justice, either as witnesses or suitors."

The court added that "on principle" it was "unable to perceive any distinction in the privilege, both of the suitor and the court, between a plaintiff and defendant."

In *Fisk* v. *Westover*, 4 S. Dakota, 233, the court said that a perusal of the cases in which the immunity of a suitor has been upheld discloses no distinction between a plaintiff and a defendant, that the reasoning of the courts is as applicable to the one as to the other, and that the rule of privilege has been applied indiscriminately.

In *Roberts* v. *Thompson*, 134 N. Y. Supplement, 363, the court rejected the distinction sought to be made between plaintiffs and defendants and held that a non-resident coming into a state to attend litigation, whether as plaintiff or defendant, should be protected from being required to engage in other litigation against his will.

In *Parker* v. *Marco*, 136 N. Y., 585, the court observed that,

> "The tendency has been not to restrict, but to enlarge, the right of privilege so as to afford full protection to parties and witnesses."

III.

A COMMON LAW PRIVILEGE.

Counsel asks what statute or constitutional provision confers the immunity or privilege which the State and Federal courts have, since the foundation of our government, extended to non-resident suitors and witnesses. This query is based on a misapprehension. The privilege is a common-law privilege. It is very ancient. Our courts, Federal and State, accepted it at the outset as a settled common-law doctrine. It has not been abrogated by statute, except in two or three states possibly, and remains the law.

True, there is no common law in the United States, but in the language of this Honorable Court (*Smith* v. *Alabama,* 124 U. S., 591):

> "There is, however, one clear exception to the statement that there is no national common law. The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history."

The judicial power of the United States is vested in the Supreme Court and other courts. Questions of jurisdiction, service, privilege and waiver are necessarily, in the absence of plain statutory provision, settled in the light of common law doctrines and principles. This court, as well as the subordinate Federal tribunals, have never had the slightest doubt as to their power, or as to the power of the State courts, to apply the ancient doctrine of privilege or immunity in the interest, not only of suitors

and witnesses, but in that of the judicial tribunals themselves—of their dignity and authority—and in that of the administration of justice.

We respectfully submit that the District Court of the United States for the Northern District of Illinois committed no error in entering its judgment quashing the service on the defendant in error, or in any other ruling complained of, and that the said judgment should be affirmed.

Respectfully submitted.

CLARENCE S. DARROW,
Attorney for Defendant in Error.

STEWART *v.* RAMSAY.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 105. Argued November 15, 1916.—Decided December 4, 1916.

A direct writ of error lies, under Judicial Code, § 238, to test the jurisdiction of the District Court over the person of the defendant.

A District Court sitting in one State cannot acquire personal jurisdiction over a citizen and resident of another through civil process served upon him while in attendance on such court as plaintiff and witness and while he is returning from the court-room after testifying.

THE case is stated in the opinion.

Mr. Robert C. Fergus for plaintiff in error.

Mr. Clarence S. Darrow for defendant in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

Stewart brought an action at law against Ramsay in the United States District Court for the Northern District of Illinois, and the summons was served personally upon defendant in that District. The jurisdiction was invoked on the ground that plaintiff was a citizen of Illinois and a resident of the Northern District and defendant was a citizen and resident of Colorado. Ramsay pleaded in abatement that he was a resident of the State of Colorado and was served with process while in attendance upon the District Court as a witness in a case wherein he was plaintiff and one Anderson defendant, and that the process was served while he was returning from the court-room after testifying. Upon plaintiff's demurrer this plea was sustained, and, plaintiff electing to stand upon his demurrer, it was ordered that the writ be quashed and

the defendant go without day. The present writ of error was sued out under § 238, Judicial Code, the jurisdictional question being certified.

That a direct writ of error lies in such a case is well settled. *Merriam Company* v. *Saalfield*, 241 U. S. 22, 26.

In our opinion, the decision of the District Court was correct. The true rule, well founded in reason and sustained by the greater weight of authority, is, that suitors, as well as witnesses, coming from another State or jurisdiction, are exempt from the service of civil process while in attendance upon court, and during a reasonable time in coming and going. A leading authority in the state courts is *Halsey* v. *Stewart*, 4 N. J. L. 366, decided in the New Jersey Supreme Court nearly one hundred years ago, upon the following reasoning: "Courts of justice ought everywhere to be open, accessible, free from interruption, and to cast a perfect protection around every man who necessarily approaches them. The citizen, in every claim of right which he exhibits, and every defense which he is obliged to make, should be permitted to approach them, not only without subjecting himself to evil, but even free from the fear of molestation or hindrance. He should also be enabled to procure, without difficulty, the attendance of all such persons as are necessary to manifest his rights. Now, this great object in the administration of justice would in a variety of ways be obstructed, if parties and witnesses were liable to be served with process, while actually attending the court. It is often matter of great importance to the citizen, to prevent the institution and prosecution of a suit in any court, at a distance from his home and his means of defense; and the fear that a suit may be commenced there by summons, will as effectually prevent his approach as if a *capias* might be served upon him. This is especially the case with citizens of neighboring States, to whom the power which the court possesses of compelling attendance, cannot reach."

The state courts, with few exceptions, have followed this rule, applying it to plaintiffs as well as defendants, and to witnesses attending voluntarily as well as those under subpœna. Illustrative cases may be cited. *Richardson* v. *Smith*, 74 N. J. L. 111, 114; *Matthews* v. *Tufts*, 87 N. Y. 568; *Mitchell* v. *Huron Circuit Judge*, 53 Michigan, 541; *Andrews* v. *Lembeck*, 46 Oh. St. 38; *Wilson* v. *Donaldson*, 117 Indiana, 356; *First Natl. Bank* v. *Ames*, 39 Minnesota, 179; *Linton* v. *Cooper*, 54 Nebraska, 438; *Bolz* v. *Crone*, 64 Kansas, 570; *Murray* v. *Wilcox*, 122 Iowa, 188; *Martin* v. *Bacon*, 76 Arkansas, 158.

There are a few cases to the contrary, of which *Bishop* v. *Vose*, 27 Connecticut, 1, 11; *Baldwin* v. *Emerson*, 16 R. I. 304; *Lewis* v. *Miller, Judge*, 115 Kentucky, 623, are instances.

In *Blight* v. *Fisher* (1809), Pet. C. C. 41, Fed. Cas. No. 1542, Mr. Justice Washington, sitting at circuit, held that the privilege of a suitor or witness extended only to an exemption from arrest, and that the service of a summons was not a violation of the privilege or a contempt of court unless done in the actual or constructive presence of the court. But in *Parker* v. *Hotchkiss* (1849), 1 Wall. Jr. 269, Fed. Cas. No. 10,739, District Judge Kane, with the concurrence, as he states, of Chief Justice Taney and Mr. Justice Grier, overruled *Blight* v. *Fisher*, and sustained the privilege in favor of a non-resident admitted to make defense in a pending suit and served with summons while attending court for that purpose, the court declaring: "The privilege which is asserted here is the privilege of the court, rather than of the defendant. It is founded in the necessities of the judicial administration, which would be often embarrassed, and sometimes interrupted, if the suitor might be vexed with process while attending upon the court for the protection of his rights, or the witness while attending to testify. Witnesses would be chary of coming within our jurisdiction, and would be exposed

to dangerous influences, if they might be punished with a law suit for displeasing parties by their testimony; and even parties in interest, whether on the record or not, might be deterred from the rightfully fearless assertion of a claim or the rightfully fearless assertion of a defense, if they were liable to be visited on the instant with writs from the defeated party." Since this decision, the federal Circuit and District Courts have consistently sustained the privilege. *Juneau Bank* v. *McSpedan*, 5 Bissell, 64; Fed. Cas. 7,582; *Brooks* v. *Farwell*, 4 Fed. Rep. 166; *Atchison* v. *Morris*, 11 Fed. Rep. 582; *Nichols* v. *Horton*, 14 Fed. Rep. 327; *Wilson Sewing Mch. Co.* v. *Wilson*, 22 Fed. Rep. 803; *Small* v. *Montgomery*, 23 Fed. Rep. 707; *Kinne* v. *Lant*, 68 Fed. Rep. 436; *Hale* v. *Wharton*, 73 Fed. Rep. 739; *Morrow* v. *U. H. Dudley & Co.*, 144 Fed. Rep. 441; *Skinner & Mounce Co.* v. *Waite*, 155 Fed. Rep. 828; *Peet* v. *Fowler*, 170 Fed. Rep. 618; *Roschynialski* v. *Hale*, 201 Fed. Rep. 1017.

Judgment affirmed.